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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NATHAN RAY FOREMAN	§	**DEFENDANT-APPELLANT**
	§	
VS.	§	
	§	
THE STATE OF TEXAS	§	**PLAINTIFF-APPELLEE**

APPELLANT'S REPLY TO THE STATE'S BRIEF ON DISCRETIONARY REVIEW

CAUSE NOS. 14-15-01005-CR AND 14-15-01006-CR
IN THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT

CAUSE NOS. 1374837 AND 1374837
IN THE 177TH DISTRICT COURT OF HARRIS COUNTY

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TO THE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW NATHAN RAY FOREMAN, Appellant herein, by and through his attorneys, **STANLEY G. SCHNEIDER and TOM MORAN,** and pursuant to TEX. R. APP. P. 38.2, files this response to the State's Brief on the Merits and would show the Court as follows:

I. INTRODUCTION

The State appeals the *en banc* decision of the Fourteenth Court of Appeals holding that the affidavit for a search warrant issued by a magistrate failed to establish probable cause that a surveillance video existed because it provided no facts that a computer contained a surveillance video which was involved in the crime, directly or indirectly such that its existence could be inferred. *Foreman v. State,* 561 S.W.3d 218 (Tex. App. – Houston [14th Dist.], 2018, pet, granted) (*en banc*).

The State also challenges the court of appeals' holding that the State failed to present evidence at the trial court showing the officers seizing the warrant had probable cause that the hard drive contained evidence, thereby authorizing a seizure under the plain view doctrine. Appellant believes that the court of appeals correctly held that a magistrate cannot infer in the absence of factual assertions in an affidavit that a business has a surveillance camera system and that system is stored and maintained in a computer in the business. The court of appeals held that the Fourth

Amendment, U.S. CONST. amend. IV, and TEX. CONST. art. I § 9 require that a search warrants be issued only for items for which probable cause is established in the affidavit supporting the search warrant.

The State argues, that during a search that occurs two weeks after an alleged crime, a computer and hard drive could be seized under the plain view doctrine even though no fact existed that it was immediately apparent to the officers that the hard drive contained evidence when it was seized. And, unlike a kilo of cocaine sitting on a coffee table or a smoking pistol next to a body, it is impossible to determine what evidence is stored on a hard drive without a technical inspection of the drive.

Appellant asserts that a computer hard drive is constitutionally identical to a cell phone and there must be a judicial determination of probable cause that evidence exists on the hard drive before it can be searched. *See State v. Granville,* 423 S.W.3d 399 (Tex. Crim. App. 2014); *Riley v. California,* 573 U.S. 373 (2014).

Finally, the State challenges the court of appeals' holding that the error was harmful under the non-constitutional error standard in TEX. R. APP. P. 44.2(b) by determining that the error in admitting the video had a substantial and injurious effect or influence on the verdict. The State's final argument, misapplication of the harmless error rule in TEX. R. APP. P. 44.2(b) for non-constitutional error, is based on a faulty premise, that is the application of the federal good faith exception to the

exclusionary rule by application of TEX. CODE CRIM. PROC. ANN. art. 38.23 meant that the Rule 44.2(b) non-constitutional harmless error applied rather than the constitutional harmless error rule in TEX. R. APP. P. 44.2(a).[1]

The State's relies solely on an opinion from the Ft. Worth Court of Appeals in *Daugherty v. State,* 968 S.W.2d 487, 489 (Tex. App. – Fort Worth 1998, no pet.) *See* State's Post-submission Brief at 8-9. The State has ignored this Court's opinion in *Love v. State,* 543 S.W.3d 835, 846 (Tex. Crim. App. 2016), that specifically rejects the State's novel argument.

II. REPLY TO STATE'S FIRST ISSUE

The warrant affidavit is totally lacking in facts that *any* evidence is present at the place to be searched, let alone surveillance cameras.

A. Summary of the Argument

The State argues that the magistrate, without any factual support, could infer that 1) there was a surveillance camera system at Appellant's body shop and 2) that the output of those cameras was recorded and the recordings kept at the location. It is axiomatic that no search warrant may issue for any purpose unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. TEX. CODE CRIM. PROC. ANN. art. 18.01(b). Probable cause

[1]The State in its brief to this Court recognizes it is a "novel" argument. State's Brief on the Merits, 33 and n. 8.

sufficient to support a search warrant exists if the **facts contained in the four corners of the affidavit and the reasonable inferences drawn therefrom justify the magistrate's conclusion** that the object of the search is probably on the premises at the time of issuance. *Nichols v. State*, 877 S.W.2d 494, 498 (Tex. App.—Fort Worth 1994, pet ref'd). (Emphasis added) The magistrate may interpret the probable cause affidavit in a non-technical, common-sense manner and may draw reasonable inferences from it. *See Illinois v. Gates,* 462 U.S. 213, 235-38 (1983). Thus, an inference must be based on some facts contained within the affidavit. There is nothing in the record other than the State's argument on how common surveillance cameras are in businesses and whether or where the output is stored and for how long.

The State's argument distilled to its essence is that a magistrate, in the absence of facts alleged in the affidavit, can guess as to the presence of evidence at a specific place. If the State is correct, the probable cause requirement of the Fourth Amendment and Article I, § 9 would be eviscerated.

B. Relevant Facts

In the first paragraph of the warrant affidavit, the affiant, D. Arnold, seeks authorization to search for and to seize

> any and all ITEMS CONSTITUTING EVIDENCE CONSTITUTING AGGRAVATED ASSAULT AND ROBBERY that may be found therein including, but not limited to all DNA and items that may contain

> biological material; fingerprints; hair fibers); audio/video surveillance video and/or video equipment; instrumentalities of the crime including firearm(s) and ballistics evidence; gasoline container(s), lighter(s), tape, zip tie(s), van; fruits of the crime including wallet(s), suitcase, briefcase, money, documents establishing identity of Complainant(s) and/or Suspect(s) such as paper(s), license(s), cell phone(s).

C.R. (1374837)-35.[2]

The next paragraph describes the place to be searched in great detail, including the description of the building, the sign in front of the building, the color of the glass in the front door and the color of the doors at the back of the business. *Id.* Conspicuously, the affiant does not mention the prescence of any surveillance camera on the outside of the building in the warrant.

The next several paragraphs describe the offense in some detail, the location as given by the complainant, the complainant's identification of Appellant from a photo array and Appellant's connection with the body shop where the offense purportedly occurred. *Id.* at 35-36. The affidavit ends with:

> Affiant believes that Complainants and Suspects DNA will be inside the Target Location along with property belonging to Complainant such as money, suitcase/briefcase, wallets, cell phone, identification cards. Also instrumentalities of the crime such as white van that transported Complainants, guns used to shoot Complainants, zip ties used to tie complainants may also be inside Target Location.

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[2]The search warrant apparently was never introduced into evidence. The copy in the clerk's record is attached to Appellant's Motion to Suppress Evidence. It appears to be a certified copy from the District Clerk's records.

Id. at 36.

The affidavit contains no facts supporting the affiant's belief that the items listed in affidavit were present at the place to be searched at the time the warrant was issued or that evidence might be discovered on or in the items. There is no mention of any computers, video equipment, cameras, stored records or any indicia that the affiant even suspected a surveillance system at Appellant's business.

The affiant, Officer Arnold, testified at the hearing on the motion to suppress evidence that he was aware of an outside surveillance system before he wrote the search warrant affidavit. Officer Arnold did not which business the cameras were linked. Officer Arnold testified "it was not unusual" and "probably expected" that a business like a body shop would have surveillance equipment. *Foreman,* 561 S.W.3d at 225. However, no facts or inferences about surveillance equipment was included in the warrant affidavit.

C. The State's Argument

The State writes in its brief to this Court:

> The Fourteenth Court's basic observation – the affidavit did not explicitly state there were surveillance cameras at Dreams Auto Customs – is true, as far as it goes. The affidavit also is silent on whether anyone involved in the office (sic) had hair, left fingerprints, or shed skin cells on the premises, yet the warrant authorized the seizure of "all DNA and other items that may contain biological material; fingerprints; [and] hair fibers."

State's Brief on the merits at 22.

Instead, the State relies on *Flores v. State,* 319 S.W.3d 697, 703 (Tex. Crim. App. 2010) for the proposition that magistrate can draw indirect inferences from facts stated in an affidavit. State's Brief on the merits at 23.

D. The *en banc* Court of Appeals' Analysis

The *en banc* court of appeals found the affidavit contained neither facts establishing probable cause that a surveillance system was at Dream Auto Customs nor facts supporting a reasonable inference that a computer system containing surveillance video was involved, 561 S.W.3d at 238. The court held the existence of a video surveillance system was not common knowledge upon which a magistrate could infer at the shop. The court wrote:

> The State asserts that "[a]n Amazon search or a visit to Costco" will "reveal" that sophisticated surveillance systems are inexpensive. The State also offers a chart of Westlaw search hits for "security camera" or "surveillance camera" to demonstrate "[t]he ubiquity of surveillance cameras in ordinary life." But matters that are common knowledge (i.e., that a person takes his clothes off at home) do not need to be evidenced through Amazon searches or charts of Westlaw search hits. "Common knowledge consists of matter[s] 'so well known to the community as to be beyond dispute.'" *Cardona v. State,* 134 S.W.3d 854, 859 (Tex. App.—Amarillo 2004, pet. ref'd) (quoting *Ritz Car Wash, Inc. v. Kastis,* 976 S.W.2d 812, 814 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). The presence of surveillance video or equipment in an auto shop is not so well known to the community as to be beyond dispute.

Id. at 239.

E. Arguments and Authorities

The State complains of the *en banc* court's definition of "common knowledge" as being "beyond dispute" as the standard by which magistrates may make inferences when issuing warrants. The State argues that "common knowledge" must only meet a fair probability standard. State's Brief on the merits at 29. It also seems to argue that a magistrate can draw an inference based on information not included in the affidavit such as the probability that auto body shops have surveillance cameras.

This Court has clearly stated that inferences are conclusions reached by considering other facts and deducing a logical conclusion from them. *Hooper v. State,* 214 S.W.3d 9, 16 (Tex. Crim. App. 2007). And, in assessing the validity of a search warrant, the inference must be drawn from facts contained within the four corners of the affidavit to justify the magistrate's conclusion that the object of the search is probably on the premises. *See Nichols v. State*, supra. The magistrate may interpret the probable cause affidavit in a non-technical, common-sense manner and may draw reasonable inferences from the facts alleged within the affidavit. See *Illinois v. Gates, supra.*

More important to the issue of common knowledge that a surveillance system existed is testimony from one of the seizing officers quoted by the court of appeals in its discussion of the plain view doctrine. The officer testified:

Q. And then why did you seize 2 and 3? They weren't connected to any audio video information.

A. I would not know whether they had audio video information on it, until it was seized and examined by the forensics lab.

Q. Right. You had no information that there was any audio video information on any three of those hard drives, correct?

A. I didn't know if the hard drive on the floor that was connected to the monitor was actually recording at that time, but my assumption [sic] that it was.

Q. You're saying you assumed. But myspecific question to you is that on the day you asked for this warrant you did not have information to believe that there were any hard drives with audio video information in this office.

A. Well, there were cameras on the back of the building. So we knew that there were cameras in the location.

. . .

Q. So, it's not in your warrant. So, in your warrant you didn't state that you had information about audio surveillance cameras, correct?

A. We didn't know if those cameras were hooked up to that particular building. It's a long strip center.

Q. And the question is you didn't say anything about it?

A. We didn't say anything about it. No, sir.

Q. Because you didn't know if it existed, correct?

A. We weren't sure if it existed or not.

. . .

Q. In fact, you didn't have any information about what was on there.

You previously stated you had no idea what was on them.

A. Correct

561 S.W.3d at 243.[3]

Based on the record, there was no probable cause there was video surveillance equipment at Dream Auto Customs at the time of the issuance of the warrant because the business was in a long strip shopping center and no one knew if the visible cameras hooked up to the particular building housing Dream Auto Customs were linked to Dream Auto Customs or some other business. Based on the officer's testimony, the existence of surveillance equipment at Dream Auto Customs was pure speculation, hunch and hope.

This Court has consistently held that inferences forming the basis for probable cause must come from facts within the four corners of the affidavit. *See e.g. Crider v. State,* 352 S.W.3d 704, 707 (Tex. Crim. App. 2011) (Affidavits are to be read "realistically and with common sense," and reasonable inferences may be drawn from the facts and circumstances set out within the four corners of the affidavit. But there must be sufficient facts within the affidavit to support a probable-cause finding that

[3]The officer testified he was searching for audio surveillance recordings. Use of a video surveillance device which intercepts or records oral communications is a felony. TEX PENAL CODE ANN. § 16.02(b). Regardless of any other fact, Appellant asserts it is not common knowledge that persons using surveillance security equipment engage in felonies.

the evidence is still available and in the same location. We agree that the "proper method to determine whether the facts supporting a search warrant have become stale is to examine, in light of the type of criminal activity involved, the time elapsing between the occurrence of the events set out in the affidavit and the time the search warrant was issued."); *State v. Jordan,* 342 S.W.3d 565, 569 (Tex. Crim. App. 2011) (The magistrate may interpret the affidavit in a non-technical, common-sense manner and may draw reasonable inferences from the facts and circumstances contained within its four corners.); *Cassias v, State,* 719 S.W.2d 585, 587-88 (Tex. Crim. App. 1986) (The magistrate may interpret the affidavit in a non-technical, common-sense manner and may draw reasonable inferences from the facts and circumstances contained within its four corners.) This Court uses a similar analysis in determining whether inferences may support a conviction against an insufficiency of the evidence challenge. *Zuniga v. State,* 551 S.W.3d 729, 732 (Tex. Crim. App. 2018) (This standard requires the appellate court to defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."); *Blackman v. State,* 350 S.W.3d 588, 595 (Tex. Crim. App. 2011) (This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts

to ultimate facts.").

While the State contests the *en banc* court of appeals' use of being beyond dispute as the standard for determining whether a fact is common knowledge, it provides no suggested test other than to say it is "a fair probability" to determine whether a fact is common knowledge. However, a review of cases considering 'common knowledge" as the basis of a probable cause determination is considerably higher that the fair probability standard suggested by the State. For example, in *Ellis v. State,* 722 S.W.2d 192, 196 (Tex. App. – Dallas 1986, no pet.), the Dallas Court of Appeals held that a magistrate considering a search warrant for gambling activity on a specific weekend could consider that professional football games were being played that weekend.

In *Hamel v. State,* 582 S.W.2d 424, 428-29 (Tex. Crim. App. 1979 [panel op.]), Judge W. C. Davis, wrote in a concurring opinion, that in determining probable cause for a warrantless arrest, an officer could consider as common knowledge that a person who has purchased writing tablets would not place them uncovered on the floor of a car occupied by four persons where the tablets were assured of being soiled.

In *Duncantell v. State,* 565 S.W.2d 252, 254 (Tex. Crim. App. 1978), the Court held the common knowledge that use of marijuana or a combination of

marijuana and alcohol often results in a form of intoxication along with other facts established probable cause to search a car. *Accord, Parker v. State,* 576 S.W.2d 613, 614 (Tex. Crim. App. 1979)

In *Flores v. State,* 287 S.W.3d 307, 313-14 (Tex. App. – Austin 2009), *affirmed* 319 S.W.3d 697 (Tex. Crim. App. 2010), the Austin Court of Appeals held that it is common knowledge that persons have no reasonable expectation of privacy in plastic garbage bags left by the side of a public street.

The Corpus Christi Court of Appeals in *Dill v. State,* 697 S.W.2d 702, 705 (Tex. App – Corpus Christi 1985, no pet.) held that it is common knowledge that can form the basis of probable cause that heroin addicts often turn to a life of crime. In *Bustamante v. State,* 917 S.W.2d 144, 147 (Tex. App. – Waco 1995, no pet.), the court held it is common knowledge to support a warrantless search of a vehicle that smugglers often use secret compartments to conceal contraband.

Courts of Appeals have determined that the use of use of an acronym in an affidavit proper because there is a common knowledge of the meaning of the acronym. *See Gravitt v. State*, No. 05-10-01195-CR, 2011 Tex. App. LEXIS 8675, 2011 WL 5178337, at *3 n. 1 (Tex. App.—Dallas Nov. 2, 2011, no pet.) (not designated for publication) (concluding the affidavit was not deficient even when it did not explain the acronyms, and it was well-known that they stood for the National

Crime Information Center (NCIC) and Texas Crime Information Center (TCIC)). Texas case law demonstrates it is well-known throughout this state that AFIS is a fingerprint database, whose letters stand for the Automated Fingerprint Identification System. *See*, *e.g.*, *Ex Parte Mile*s, 359 S.W.3d 647, 654 (Tex. Crim. App. 2012); *McCreary v. State*, No. 01-10-01035-CR, 2012 Tex. App. LEXIS 3890, 2012 WL 1753005, at *2 (Tex. App.—Houston [1st Dist.] May 17, 2012, no pet.) (not designated for publication); *Dawkins v. State*, No. 08-09-00217-CR, 2011 Tex. App. LEXIS 2553, 2011 WL 1312285, at *2 (Tex. App.—El Paso Apr. 6, 2011, no pet.) (not designated for publication); *Wilson v. State*, No. 02-09-00039-CR, 2010 Tex. App. LEXIS 8685, 2010 WL 4261872, at *3 (Tex. App.—Fort Worth Oct. 28, 2010, no pet.) (not designated for publication); *Perez v. State*, No. 03-09-00618-CR, 2010 Tex. App. LEXIS 8469, 2010 WL 4137443, at *1 (Tex. App.—Austin Oct. 21, 2010, no pet.) (not designated for publication); *Lightner v. State*, 2013 Tex. App. LEXIS 5365, *21-23, 2013 WL 1819992(not designated for publication).

The State's "fair probability" standard lacks precision in that it does not distinguish whether there is a fair probability that a fact is true or whether it is common knowledge. Clearly, the case law in this state requires far more than a fair probability that a fact is common knowledge. There must be a factual basis that suggests that a "fair probability" exists. For example, the magistrate in *Ellis* would

have to be living under a rock in Dallas County – the home of the Dallas Cowboys – not to know that professional football games were being played on a specific weekend. Each of the cited cases finding common knowledge make that finding for facts which are much closer to the *en banc* court of appeals' formulation of beyond dispute than the State's fair probability. The State's fair probability definition of common knowledge invites magistrates and reviewing courts to engage in speculation.

While the Rules of Evidence do not apply to the issuance of search warrants, TEX. R. EVID. 101(e)(3)(E), the rules for taking judicial notice of facts provide guidance as to what is sufficient common knowledge that it can be accepted without proof. The Rules of Evidence allow courts to take judicial notice of facts not subject to reasonable dispute because they are generally known within the territorial jurisdiction of the court or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. TEX. R. EVID. 201(b). This is consistent with the cases finding common knowledge of facts such as marijuana use causes intoxication, trash bags placed at the curb of a residence are abandoned, whether professional football games are played on a specific weekend and whether heroin addicts often turn to a life of crime. Each of those is a fact generally known in the court's territorial jurisdiction and not subject to reasonable dispute. TEX. R.

EVID. 201(b)(1).

The fact that surveillance cameras are commonly used at auto body shops is not such a fact. And, the fact that even if surveillance cameras are commonly used at auto body shops would not make it common knowledge that the output of such cameras would be at the location two weeks later.

Thus, while it can be argued that the language used by the *en banc* court of appeals – beyond dispute – may be too strong, it cannot be argued that much more than a reasonable probability that a fact is common knowledge is required. And whether an inference can be drawn from knowledge that is beyond dispute or a reasonable probability of its existence, there must be some factual basis for that determination.

Therefore, the *en banc* court of appeals did not err in finding the disputed facts of use of surveillance cameras at body shops was not common knowledge or a reasonable inference from the facts in the affidavit. This Court should affirm the holding of the *en banc* court of appeals on this issue.

III. REPLY TO THE STATE'S SECOND ISSUE

A. Summary of the Argument

The plain view doctrine did not authorize the seizure or search of the computer hard drive

The *en banc* court of appeals properly analyzed the seizure of the hard drive in question under the plain view doctrine. It was not immediately apparent to the officers that the hard drive contained evidence. It was only after a forensic analysis at a police laboratory that the surveillance video was found. If it was immediately apparent that the hard drive contained evidence because it was connected to a monitor showing surveillance videos, why did the police seize two other hard drives?

The court of appeals' decision also should be affirmed on a ground not analyzed by that court. Both this Court and the Supreme Court of the United States have held that memories on cell phones cannot be searched and analyzed by law enforcement without a warrant even if the cell phones are legally in the custody of the authorities.

The reasoning applies equally to computer hard drives.[4] Both contain large amounts of personal information including financial and health data, photographs, stored messages and other types of highly personal information. This Court in *Granville* and the Supreme Court in *Riley* noted the highly personal nature and the reasonable expectation of privacy in cell phone data and require a warrant to search the information stored on the phone. The State lacked a search warrant to search the

[4]The modern smart phone essentially is a computer with a connection to a cell phone network or wi-fi system.

contents of the hard drive.[5]

B. Relevant Facts

The relevant facts taken from the court of appeals' opinion are:

> Arnold also testified about the search warrant, the supporting affidavit, and the search. With regard to the computer hard drive containing the surveillance video, Arnold testified that when he executed the search, he observed that the hard drive appeared to be connected to a flat screen TV showing surveillance, and he "had reason to believe that was actually a surveillance system that was hopefully going to depict what video was collected in there.

561 S.W.3d at 228.

The court of appeals quoted the following testimony from one of the seizing officers in its opinion:

> Q. And then why did you seize 2 and 3? They weren't connected to any audio video information.
>
> A. I would not know whether they had audio video information on it, until it was seized and examined by the forensics lab.
>
> Q. Right. You had no information that there was any audio video information on any three of those hard drives, correct?
>
> A. I didn't know if the hard drive on the floor that was connected to the monitor was actually recording at that time, but my assumption [sic] that it was.
>
> Q. You're saying you assumed. But my specific question to you is

[5]The search warrant authorized the seizure surveillance videos and video equipment, not the search and analysis of hard drives. C.R. (1374837)-37.

that on the day you asked for this warrant you did not have information to believe that there were any hard drives with audio video information in this office.

A. Well, there were cameras on the back of the building. So we knew that there were cameras in the location.

. . .

Q. So, it's not in your warrant. So, in your warrant you didn't state that you had information about audio surveillance cameras, correct?

A. We didn't know if those cameras were hooked up to that particular building. It's a long strip center.

Q. And the question is you didn't say anything about it?

A. We didn't say anything about it. No, sir.

Q. Because you didn't know if it existed, correct?

A. We weren't sure if it existed or not.

. . .

Q. In fact, you didn't have any information about what was on there. You previously stated you had no idea what was on them.

A. Correct

561 S.W.3d at 243.

C. The State's Argument

As a preliminary matter, the State in its brief mischaracterizes the holding of the *en banc* court of appeals in its introductory paragraph to this section of its brief. The State wrote:

> **The Fourteenth Court erred by holding that when officers see a surveillance system recording a location where a crime occurred two weeks prior, they do not have probable cause to seize the system's hard drive unless they know what is on the hard drive prior to examining it.**

State's Brief on the merits at 27 (emphasis in original).

The *en banc* court of appeals described the State's basic argument as:

> The State contends that the plain-view exception does apply. The State points out that officers executing the warrant "observed an external hard drive connected to a monitor that was showing a live surveillance feed from six cameras throughout the garage." The State argues that "anyone seeing a device capable of recording and storing data connected to a surveillance system at a location where a crime occurred recently would have probable cause to believe the device would be evidence of a crime." The State emphasizes that the plain-view doctrine does not require certainty that an object is evidence, only probable cause.

561 S.W.3d at 241.

D. The Court of Appeals' Analysis

In fact, what the court of appeals held after analyzing the trial testimony of the two officers who served the search warrant was:

> When the officers viewed the computer hard drives, they believed that the hard drives contained a surveillance system. The officers also "assumed" that surveillance system "might" have recorded video at one time. None of the officers' testimony indicated that the officers believed the hard drive at issue would contain video surveillance from the time of the offenses or otherwise constitute evidence of the offenses

561 S.W.3d at 243. *See generally, id.* at 242-43.

The en banc court of appeals also noted that:

> The fact that officers seized two other computer hard drives even though they could not tell what those hard drives were being used for further undermines a probable cause determination.

Id.

The court of appeals held the incriminatory nature of the seized hard drive was not apparent until there was an additional search of the drive itself. *Id.* at 244.

In essence, the *en banc* court of appeals held the officers lacked probable cause to believe that the hard drives contained evidence at the time of the seizure based on their testimony that the seizure was premised on their "hunches or hoped" for evidence. The officers never articulated *facts* showing probable cause that the hard drives at the time of seizure contained evidence.

E. Arguments and Authorities

1. Plain View: No Probable Cause

The plain view doctrine applies only to seizures, not searches. *Russo v. State,* 228 S.W.3d 779, 802 (Tex. App. – Austin 2007, pet. ref'd). Therefore, the doctrine does not apply to the later warrantless search of the computer hard drives.

As noted by the court of appeals, while the plain view doctrine often is called an exception to the warrant requirement, if an object is in plain view to officers

legally on the scene, there is no privacy interest to be protected. 561 S.W.3d at 240-41. Thus, to justify a seizure under the plain view doctrine, the State must show three things: 1) the seizing officer was legally where he could observe the item seized; 2) it must be immediately apparent it is contraband or contains evidence, that is, the officers must have probable cause that the item contains evidence; and 3) the officers must have the right to access the item. 561 S.W.3d at 241(citing *Keehn v. State,* 279 S.W.3d 330, 334 (Tex. Crim. App. 2009)). If additional manipulation of the object is required to show probable cause, its incriminating nature is not immediately apparent and it cannot be seized. 561 S.W.3d at 241(citing *State v. Dobbs,* 323 S.W.3d 184, 189 (Tex. Crim. App. 2010)) (The Supreme Court has construed "immediately apparent" to mean simply that the viewing officers must have probable cause to believe an item in plain view is contraband before seizing it.). *See also Minnesota v. Dickerson,* 508 U.S. 366, 375 (1993) (If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object -- I. e., if "its incriminating character [is not] 'immediately apparent,'"-- the plain-view doctrine cannot justify its seizure.) (internal citations omitted).

A typical plain view case would be drugs in plain view in a car such as *Wright v. State,* 7 S.W.3d 148 (Tex. Crim. App. 1999). The officer sees the drugs in plain

view and has probable cause to seize them.

In the instant case, two weeks after the alleged offense, the officers serving the warrant on Dream Auto Customs saw a computer monitor with video surveillance camera output visible. A portable, detachable hard drive was attached.

The portable hard drive and two other portable hard drives were seized and video was found on the first drive showing parts of the offense later shown to the jury. The seizure was fully two weeks after the offense. By definition, a portable hard drive is portable. It connects to a computer system easily and is easily detached. It is designed for temporary use such as backing up a computer's hard drive or allowing several computers to use the data on the portable hard drive.

The searching officers' testimony in the trial court failed to show probable cause at the time of the seizure that the portable hard drives seized contained evidence. *See* 561S.W.3d at 242-43. The officers' testimony shows the seizure was based on a mere hunch, speculation and hope that the portable hard drive contained video from two weeks prior to the seizure. There was no testimony or other evidence as to, for example, how long businesses typically retain surveillance videos, whether surveillance cameras will record on series of portable hard drives and regularly swap them to retain data in a safe location off site or even whether surveillance video output is typically or commonly stored on portable hard drives rather than on a

computer's internal hard drive.

2. The Additional Search

The court of appeals held an additional forensic search of the hard drive was necessary both to establish probable cause to seize the drive under the plain view doctrine. Although not discussed by the court of appeals because it was unnecessary to its decision, the additional forensic search of the hard drive also was necessary to locate the stored video shown to the jury.

Even if the hard drives were lawfully in the possession of the authorities, *Riley* and *Granville* hold the Fourth Amendment requires a warrant based on probable cause to search them. First, since the plain view doctrine applies only to seizures, there must be a warrant for the subsequent forensic search. Second, like cell phones, computer hard drives are the repository of vast amounts of personal data which are entitled to Fourth Amendment protection even if in the lawful custody of the authorities..

> The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

Love v. State, 543 S.W.3d 595, 601 n. 3 (Tex. Crim. App. 2015).

Both this Court and the Supreme Court in *Riley* have recognized that lawful

possession of the baby computers called smart phones does not allow the authorities to search them. There must be a separate finding of probable cause by a magistrate that the smart phone contains evidence of a crime or contraband. *See also* TEX. CODE CRIM. PROC. ANN. art.18.0215.

A computer hard drive or large portable hard drive likely will contain vast amounts of data in types not mentioned in *Love* such as medical or financial information, the personal writings of the owner, information protected by the First Amendment, U.S. CONST. amend. I, such as the owner's political or religious beliefs. Therefore, computer hard drives and portable hard drives should have at least as much protection as a cell phone.

The Fourth Amendment and Article I, § 9 protect this storehouse of personal data from being searched willy nilly by the authorities in the absence of a warrant based on probable cause that the hard drives contain evidence of a crime or contraband.

Often a warrant to seize computer equipment will contain finding of probable cause that it contains evidence of a crime or contraband and will allow a search of the hard drive. By way of example, a warrant to seize computers in a child pornography

case likely will include probable cause that the computers contain contraband.[6] In such a case, no further warrant is required because the magistrate has sufficient probable cause to authorize the forensic search of the computer. The probable cause to seize the computer or hard drive is the probable cause that it contains contraband or evidence.

In the instant case, there was no probable cause in the affidavit that a surveillance system's output was stored on a computer or hard drive or even that such a system existed. Therefore, the magistrate issuing the search warrant could not find probable cause that a hard drive or computer system he had no idea existed recorded output from a surveillance system he had no evidence existed. In the absence of a search warrant based on probable cause to search the hard drive, the search of the seized hard drive to determine probable cause was a Fourth Amendment, Article I, § 9 violation.

F. Conclusion as to the Plain View Doctrine

There is nothing in the record establishing probable cause that any of the three seized hard drives contained evidence of an offense or contraband. The officers' testimony set out by the *en banc* court of appeals shows that at best they had a hunch

[6]The search warrant affidavit could contain information showing the computer was used to download child pornography and statements that from the officer's experience, people who download child pornography keep it on their computer hard drives.

or speculated or hoped the hard drives contained evidence. The fact that the officers seized three hard drives is evidence they had no idea which, if any, of the hard drives contained the evidence they were seeking – video of a crime which occurred two weeks before.

It was not until the hard drives were searched that the officers' hunches were corroborated.

Therefore the *en banc* court of appeals was correct in its analysis that the plain view doctrine did not authorize the seizure of the hard drives nor the later search of those hard drives because it was immediately apparent that the hard drives had any evidentiary value.

IV. REPLY TO THE STATE'S THIRD ISSUE

The Court of Appeals Properly Found the Error Harmful

A. Summary of the Argument

The State made to the court of appeals and is making to this Court what the State called a "novel argument" that if evidence is suppressed pursuant to Article 38.23 when the federal plain view exception to the exclusionary rule might apply, the error, if any, is non-constitutional error.

While there is nothing wrong or improper in asking a court to abandon old precedent and adopt new precedent, the Disciplinary Rules of Professional Conduct

require lawyers to disclose to tribunals binding precedent directly adverse to its client's position which has not been disclosed by opposing counsel. Supreme Court of Texas, Texas Disciplinary Rules of Professional Conduct § 3.03(a)(4).

The State in arguing its novel argument failed to disclose to the *en banc* court of appeals and this Court, this Court's holding in *Love,* 543 S.W.3d at 846. In *Love,* this Court found evidence was excluded by Article 38.23(b) in a case in which the federal good faith exception might apply. This Court recognized the application of Article 38.23(b), then applied the harmless error rule in Rule 44.2(a) for constitutional error.

The *en banc* court of appeals noted Appellant's argument that Rule 44.2(a) should apply and the State's argument that the lower standard of harmless error for non-constitutional error in Rule 44.2(b) was applicable. The court of appeals never analyzed the error for harm under the constitutional error rule and instead assumed the lower standard applied and found the error was not harmless. 561 S.W.3d at 244-45.

Under *Love,* the proper standard to determine harmless error Rule 44.2(a) should have applied and the State has not even attempted to show beyond a reasonable doubt that the error did not effect the verdict or sentence.

At best, if this Court agrees with the State that the error was not harmless under

the less stringent standard of Rule 44.2(b), the most relief the State is entitled to is a determination of whether the error was harmless under Rule 44.2(a).[7]

B. The State's Argument

The essence of the State's argument is that the evidence against Appellant excluding the video was overwhelming, State's Brief on the merits at 31 and 39. The State opines that the overwhelming nature of the evidence by itself requires a determination that the admission of the surveillance video was harmless without consideration of the manner in which it was used as evidence and emphasized during the State's arguments.

C. The Court of Appeals' Analysis

Other than recounting the case law applicable to Rule 44.2(b), the court of appeals' entire analysis was:

> Given the record before us, we cannot say with fair assurance that the erroneous admission of the surveillance video did not affect appellant's substantial rights. The surveillance video was a central piece of evidence in the case. Other than information provided by complainants, admitted con artists, the video was the only strong evidence showing appellant's involvement in the offenses. Although the State presented other compelling evidence of the scene on the highway and of complainant's injuries, none of this evidence showed appellant's involvement in the aggravated robbery and aggravated kidnaping of complainants. The

[7]Even if this Court applies Rule 44.2(b) and finds the error harmless as to guilt, given the trial court's statements at sentencing, 6 R.R. 71, directly referring to the video and how it effected it the error would be harmful as to punishment and would be entitled to a new punishment hearing.

> State relied primarily on the video in making its closing arguments. In addition, the trial court explicitly stated that the video evidence impacted appellant's sentencing. Under these circumstances, we must reverse the convictions.

561 S.W. 3d at 245.

D. Arguments and Authorities

1. Choice of Harm Standard

The State in its novel argument related to Article 38.23(b) fails to understand or attempts to gloss over the difference between a constitutional violation and the remedy for that violation.

The Supreme Court in *United States v. Leon,* 468 U.S. 897 (1984), crafted a good faith exception to the exclusionary rule, not a good faith exception to the Fourth Amendment. What *Leon* and its progeny hold is that even though the Fourth Amendment was violated, it will not apply the exclusionary rule if officers acted in good faith reliance on a search warrant, albeit a defective warrant or one not supported by probable cause.

The State improperly treats the good faith exception to the exclusionary rule as an exception to the Fourth Amendment protection against unreasonable searches and seizures. Its entire novel argument is based on this misinterpretation of *Leon.*

This Court in *Love* recognized the difference between a constitutional

violation and the remedy for that violation. It found constitutional error, then applied the statutory exclusionary rule in Article 38.23 for a remedy. But the Court analyzed it as constitutional error.

In the instant case, the *en banc* court of appeals, if it erred at all, erred in applying the non-constitutional error standard of Rule 44.2(b) requested by the State rather than the proper standard in Rule 44.2(a). The error, if any, was invited by the State in its novel argument.

2. The Error Was Harmful Even Under the Rule 44.2(b) Standard

Texas Rule of Appellate procedure 44.2(b) provides that a nonconstitutional error "that does not affect substantial rights must be disregarded." This Court has determined that substantial rights are not affected by the erroneous admission of evidence "if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App.1998). In assessing the likelihood that the jury's decision was adversely affected by the error, an appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other

evidence in the case. *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). The reviewing court may also consider the jury instructions, the State's theory and any defensive theories, closing arguments and even voir dire, if applicable. *Id*.; *see also Llamas v. State*, 12 S.W.3d 469, 471 (Tex. Crim. App. 2000). Most importantly, this Court has recognized that whether the State emphasized the error can be a factor. *King v. State*, 953 S.W.2d 266, 272 (Tex. Crim. App. 1997).

In *Motilla v. State,* 78 S.W. 3d 352, 356 (Tex. Crim. App. 2002), Judge Keasler writing for the Court stated that

> an appellate court should not determine the harmfulness of an error simply by examining whether there exists overwhelming evidence to support the defendant's guilt ... Rather, the appellate court should calculate as much as possible the probable impact of the error on the jury in light of the existence of the other evidence.

In this case, the court of appeals reviewed the State's final argument and determined that the manner in which the State emphasized the surveillance video mandated a determination that the admission of the video was harmful. In its final argument, the State used 18 pages of transcript in the Reporter's Record. 6 R.R. 36-54. In that argument, the State referred to the video on eight of those pages. *Id.* 40, 41, 45, 48, 49, 50, 51, 54.

The State's argument included:

That is surveillance video footage that documents a horrible, horrible crime that occurred here in your county back on Christmas Eve of 2012.

That's not nothing. That is exactly the type of evidence that you-all told me during voir dire that you wanted because you said, "Video, yeah, that would help me make my mind up. It would be great if you could see it."

Yeah, you might not be able to see everything on the video, but you see enough. You see the perpetration of a crime, and you see its horrific aftermath.

6 R.R. 40.

The State's argument continued:

There should be no doubt in your mind after having seen that video that Nathan Ray Foreman, that man, was the one driving the boat that day. It was his orders. It was his -- it was his initial contact with our complainants that got this ball rolling. It was his orders that people come out with guns. It was his orders that they be bound, that they be gagged. It was his orders that they be burned. It was his orders that they be tossed into the back of a van to go someplace unknown to be shot and executed.

6 R.R. 41-42.

Later, the State argued:

How do you know that there was a gun used? Well, first of all, you saw Darren Franklin walking in with a gun on video. So you know that there was at least one gun there. And the testimony from Moses and Richard was that there were multiple guns there. You know that's true because these men would not have willingly submitted to being duct taped and zip tied there on the ground unless there was some danger, unless there

> was some threat, unless there was some force being used against them. Who would willingly let themselves be bound and gagged and tortured there on the ground?

6 R.R. 45.

Still later, the State again referred to the video to argue Appellant had a firearm. It said:

> So I want to look at it in terms of the timeline. First of all, at 9:54 a.m. on the surveillance video, Nathan Foreman puts an object consistent with a firearm in the back of his belt. That right there is evidence that he was in possession of a firearm.
>
> At 9:54, also, you see Darren Franklin on the surveillance video putting a gun into his waistband.
>
> Folks, if they were just there for a friendly business deal, why are we putting weapons, why are we getting all weaponed up two hours before the incident actually occurs?
>
> At 11:25, Moses Glekiah and Richard Merchant arrived at Dreams Auto Customs.
>
> At 11:30, Richard Merchant brings the money and the chemicals inside of the Dreams Auto Customs garage.
>
> At 11:37, mere minutes after Richard Merchant has peacefully entered the location with his suitcase and the backpack full of the items used to scam the defendant, Darren Franklin and Jason Cunningham enter the garage with objects in
> their hands -- you can see it on the video -- that are consistent with firearms.
>
> At 11:45, Nathan Ray Foreman retrieves duct tape and then walks off camera with it to a location that is consistent to where the complainants

are being held and tortured.

At noon, Nathan Ray Foreman is seen speaking on the phone, and then shortly thereafter Jason Washington, the Customs agent, enters in his uniform into the garage.

6 R.R. 48-49.

Still later in its argument, the State said:

At 1:00 p.m. Darren Franklin retrieves an iron, an iron that was identified by Moses and Richard as the iron that was used to torture a screaming Richard Merchant. You heard testimony from Moses about how terrified he was during that moment, how it hurt him to see his friend being hurt.

At 1:05, Charles Campbell wipes down the complainants' car. If these men, including Nathan Foreman, thought that they were in the right, if they weren't doing something that was terrible and wrong and illegal, there would be no need for them to try and wipe down and tamper with the evidence like what you see on the camera at 1:05 p.m.

MR. PONS: Objection to reference to an offense that's not --

THE COURT: Overruled.

MR. PONS: -- alleged.

MS. BYROM: And, finally, at 3:30 p.m., Nathan Ray Foreman places a blanket or tarp in the back of a van, a van where Moses Glekiah and Richard Merchant, without hope, believing that they were going to die that day, terrified, in pain, and alone, are loaded in. And if what you see Nathan Foreman doing on this video isn't aiding, assisting, encouraging and planning, I don't know what is. He is literally the person who was shutting the doors on the hope of our complaining witnesses.

6 R.R. 50-52.

Finally, the State closed its final argument with:

> And so I'm asking each and every one of you to do something, not because it's fun, but because it's right and each and every one you know it's right. You've seen the video. You've heard the testimony. There's only one decision for you to make, and that's to find Nathan Ray Foreman guilty of aggravated robbery and aggravated kidnaping.

6 R.R. 54.

The trial court also directly referred to and relied upon the video in its sentencing decision. It said:

> This is not an easy case. What I saw on the videotape that was offered into evidence is disturbing, to say the least. Because of the severity of the injuries and because of what I witnessed on the videotape, I assess your punishment at 50 years in the Texas Department of Criminal Justice Institutional Division in each case to run concurrently.

6 R.R. 71.

The State emphasized the video throughout its final argument. It used it as the basis for a timeline, it used the video throughout its final argument to show Appellant's guilt. Appellant asserts that the trial prosecutor is in a better position than anyone else to determine how important any piece of evidence is to the State's case. And, the trial court justified a 50 years prison sentence based on the disturbing nature of the surveillance video.

In this case, the prosecutor obviously thought the video was important, compelling evidence or she would not have emphasized it as she did. She used it to

tie together all of the other evidence against Appellant.

The *en banc* court of appeals correctly held that the error war harmful under Rule 44.2(b) as to guilt. It did not have to consider its harm at punishment because it vacated the conviction.

However, as applied to punishment, there can be no question that the video was harmful to Appellant. The trial judge said so.

And, the court of appeals analysis of harm is under the lower standard of Rule 44.2(b), not the correct, constitutional standard in Rule 44.2(a). If this Court finds the court of appeals erred in finding harmful error applying Rule 44.2(b), it should answer the question the court of appeals held it did not have to answer: what is the correct harmless error standard. This Court should find the error was constitutional error and find that the State did not show beyond a reasonable doubt it had no effect on the verdict. It should affirm the court of appeals.

V. OVERALL CONCLUSION

The holding of the *en banc* court of appeals was correct. The State's argument that the magistrate, in the absence of any evidence, could find it is common knowledge that surveillance cameras are sufficiently common at auto body shops to constitute probable cause is simply incorrect. Its argument that application of common knowledge to supplement a search warrant affidavit can be based on the

reasonable probability that knowledge is common is contrary to this Court's holdings and the holdings of other courts of appeal.

The *en banc* court of appeals properly analyzed the State's argument on plain view and, even if it was incorrect, the State fails to recognize that the plain view doctrine applies only to seizures, not subsequent searches. *Riley* and *Granville* require police to obtain a warrant based on probable cause before they can search a hard drive legally in their custody.

Finally, the State's "novel" argument to the court of appeals and this Court that a Fourth Amendment violation should be analyzed under the non-constitutional harmless error standard if evidence is suppressed under Article 38.23(b) is not only incorrect but contrary to this Court's established precedent. The State's error is based on the failure to recognize the difference between a constitutional violation and the remedy for that violation. While Appellant believes the court of appeals' determination of harm is correct, the court of appeals at the State's behest used the wrong harmless error test.

For these reasons, the judgment of the *en banc* court of appeals was correct and this Court should affirm its holding.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Court

affirm the Court of Appeals and remand this case to the trial court for a new trial or a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 9,096 words except for the portions exempt under TEX. R. APP. P. 9.4(i)(1).

/s/Stanley G. Schneider
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CERTIFICATE OF SERVICE

I certify that on this 14th day of May, this brief was served on Clint Morgan, Assistant District Attorney for the Harris County District Attorney's Office and Stacey Soule, State Prosecuting Attorney via electronic filing on the efile.txcourts.gov portal.

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